92-120

No. (1)

Supreme Court, U.S.
FILED
JUL 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JOHN W. BANKS II,

Petitioner,

v.

VERNA J. BANKS,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeals For The Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the order reopening petitioner's divorce case to divide his Veterans' Administration disability benefits as community property was void under the Supremacy Clause of the Federal Constitution for lack of subject matter jurisdiction because the anti-attachment provision of the Veterans' Benefits Act (38 U.S.C. §5301), which protects V.A. disability benefits from "any legal or equitable process whatever," completely preempts state court power to treat veterans' disability benefits as community property.

PARTIES

The parties are: Petitioner, JOHN W. BANKS, III, Major, USAF, Ret. and Respondent, VERNA J. BANKS.

Since Petitioner contends that application of California Civil Code §4800(a) to divide his Veterans Administration disability compensation as community property offends Art. VI, Cls. 2 of the United States Constitution, 28 U.S.C. §2403(b) may be applicable, and the Attorney General of the State of California is being served pursuant to Rule 29.4(c) of this Court.

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OPINIONS OF THE LOWER COURTS

In the parties' 1986 divorce, the trial court originally determined Major Banks' V.A. disability benefits were not subject to division as community property and awarded his ex-wife 43.95% of his net military retirement pay. (Appendix [Appen] A; CT 229.)

On May 4, 1987, the trial court reopened the case and found that, pursuant to *Casas v. Thompson*, 42 Cal.3d 131 [228 Cal.Rptr. 33] (1986), Major Bank's must pay his ex-wife 43.95% of his gross military retirement pay, including V.A. disability benefits. (Appen. B; CT 350-353.)

On December 7, 1990, the trial court entered an Order denying Major Banks' motion to set aside the Order that divided his V.A. disability benefits as community property. (Appen. C; CT 510-512.)

On January 31, 1992, in an unpublished Opinion, the California Court of Appeal for the Third Appellate District affirmed, finding the Veterans' Benefits Act (Title 38, U.S.C.) does not preempt state court subject matter jurisdiction. (Appen. D.)

On April 15, 1992, the California Supreme Court denied review without issuing a opinion. (Appen. E.)

JURISDICTIONAL GROUNDS

Major Banks invokes this court's jurisdiction under 28 U.S.C. §1257(3). Major Banks asks the court to determine whether state courts have subject matter jurisdiction to characterize V.A. disability benefits as community property in violation of 38 U.S.C. §5301 and 10 U.S.C. §1408(a)(4), that

put veterans' disability benefits beyond the reach of state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of the federal Constitution, the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. § 5301 [former §3101]), the jurisdictional limitation provisions of the Uniformed Services Former Spouses Protection Act (FUSFSPA), (10 U.S.C. §1408(a)(4) and (c)(1)), and the California Statute authorizing collateral attacks on void orders (California Code of Civil Procedure §473.) The statutes are set forth in full in the appendix because of their length. The relevant portions provide:

U.S. Const., Art. VI, Cls. 2:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

10 U.S.C. §1408(a)(4)(B):

> "(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which- * * * "(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law

in order to receive compensation under title 5 or title 38;"

38 U.S.C. §5301 [former §3101]:

(a) "Payment of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments * * *"

California Code of Civil Procedure §473:

"The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

STATEMENT OF THE CASE

Petitioner, John Banks entered the United States Air Force in 1951, and retired as a Major in 1971, after twenty years of service. (Reporter's Transcript [RT], p. 10.) John and Verna Banks were married in 1954, and separated about

17 1/2 years later in 1979. (RT 1, 11, 77.) They were married during 87.9% of the time Major Banks was on active duty with the Air Force. (RT 77.) Major Banks has a 40% disability rating from the Department of Veterans Affairs (V.A.). (RT 11.)

The ex-wife filed a petition for dissolution of marriage in 1979. (CT 1-2.) The marital status was terminated pursuant to a stipulation for bifurcation, with reservation of jurisdiction over all other issues. (CT 100, 104.) Judgment was finally entered January 1, 1986. (CT 224-230.)

The original trial court found Major Banks was awarded a disability rating of 40% by the Veterans' Administration [Department of Veterans Affairs] and determined his military retirement benefits attributable to disability were not subject to division as community property. The ex-wife was awarded 43.95% of Major Banks' **net** military retirement pay. (CT 229.) Judgment was entered on October 31, 1986. (CT 333-335.)

The ex-wife did not appeal or otherwise seek review of the decision that Major Banks' V.A. disability benefits were his separate property. However, after the California Supreme Court decided *Casas v. Thompson*, 42 Cal.3d 131 [228 Cal.Rptr. 33] (1986), but before this court overruled *Casas* in *Mansell v. Mansell*, 490 U.S. 581 [104 L.Ed.2d 675, 109 S.Ct. 2023] (1989), the ex-wife filed a motion to reopen the case on March 2, 1987, seeking division of Major Banks' V.A. disability benefits. (CT 338.)

The trial court did not apply *res judicata* to the original separate property determination. Rather, on May 4, 1987, the court found that, pursuant to *Casas v. Thompson*, 42 Cal.3d 131 [228 Cal.Rptr. 33] (1986), Major Banks must pay his ex-

wife 43.95% of his **gross** military retirement pay, including the V.A. disability benefits. (CT 353.)

In California, the normal and adequate remedy is to violate a void order deliberately, be adjudged in contempt, and then review the contempt order by *habeas corpus*. (See e.g., *Smith Metropolitan Company v. Superior Court*, 16 Cal.2d 226, [105 P.2d 587] (1940).) Review of the resulting contempt order on *certiorari* or *habeas corpus*, is a better remedy than appeal. An appeal would require obedience during the long period until reversal because Major Banks was not able to post a huge bond at the time the reopening order divided his V.A. benefits. Further, after reversal on appeal, he would be faced with the daunting task of recouping the unlawful payments from his ex-wife. Review of a contempt order would make obedience unnecessary.

Therefore, Major Banks elected to ignore the order and defend potential contempt citations. The United States Air Force also tacitly supported this decision by refusing to honor the reopening order.

However, the ex-wife has never brought a contempt action. Perhaps she recognized §5301's absolute defense to contempt, but was hoping for a favorable change in federal law.

She filed five different Orders to Show Cause to set arrearages in the division of V.A. disability benefits because the Air Force would not honor the Modified Judgment or pay her more than 43.95% of the **net** disposable retirement pay as defined in 10 U.S.C. §1408(a)(4). (CT 355-363; 381-387; 396-406; 436; 487.)

After Major Banks received a tort recovery, the ex-wife attached it to offset the Air Force refusal to honor the

reopening order. In response, Major Banks filed the present action pursuant to Code of Civil Procedure §473 to set aside the void reopening order. (CT 438-440.)

After the attachment, Maj. Banks filed the present motion under California Code of Civil Procedure §473, to set aside the void order dividing his V.A. disability benefits. He contends the order is void due to lack of subject matter jurisdiction pursuant to the federal Veterans Benefits Act (38 U.S.C. §5301.) It is also void under the retroactive provisions of §555 of Public Law 101-510. (10 U.S.C. §1408.)

Under California law, a void order is a "dead limb on the judicial tree," which has no provisional or interim effect. (*Svistunoff v. Svistunoff*, 108 Cal.App.2d 638 [239 P.2d 650] (1952).) Void judgments and orders are always subject to collateral attack. (California Code of Civil Procedure §473 [last sentence]; *Summers v. Superior Court*, 53 Cal.2d 295, 298 [1 Cal.Rptr. 324] (1959); *Consolidated Theaters v. Theatrical Stage Employees Union*, 69 Cal.2d 713, 721 [73 Cal.Rptr. 213] (1968); *Costa v. Banta*, 98 Cal.App.2d 181, 182 [219 P.2d 478] (1950).)

Major Banks contended the state court never had jurisdiction over his V.A. disability benefits, and that collateral estoppel did not prevent him from challenging the reopening order at this late date because void orders are always subject to collateral attack. (CT 421-425; 429.)

On December 7, 1990, the court denied the motion to set aside the reopening order that divided Mr. Banks' V.A. disability benefits. (CT 510-512.) On January 31, 1992, the Court of Appeal affirmed, finding the Veterans' Benefits Act does not preempt state court subject matter jurisdiction. Therefore, according to the Court of Appeal, *res judicata*

applies to prevent reconsideration, even though *res judicata* did not preclude the ex-wife from reopening the original judgment. The California Supreme Court denied review on April 15, 1992.

Major Banks seeks review in this court to determine whether the Veterans' Benefits Act (Title 38, United States Code) preempts state subject matter jurisdiction over V.A. disability benefits by virtue of the anti-attachment provisions, 38 U.S.C. §5301, which protect V.A. disability benefits from "* * * any legal or equitable process whatever, * * * *."

ARGUMENT

I
THE ORIGINAL TRIAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO REOPEN THE FINAL PROPERTY DISTRIBUTION

The trial court found it could reopen the original property distribution because *Casas v. Thompson*, 42 Cal.3d 131 [228 Cal.Rptr. 33] determined California courts could apply state law to the federal asset. According to *Casas*, FUSFSPA obliterates *McCarty v. McCarty*, 435 U.S. 210 [101 S.Ct. 2728, 69 L.Ed.2d 589], and allows the states to apply pre-*McCarty* subject matter jurisdictional analyses to military retirement pay.

Ironically, *Casas* severely criticized, without overruling *In re Marriage of Costo*, 156 Cal.App.3d 781 [203 Cal.Rptr. 85] (1984), the only reported California decision that correctly interpreted the Veterans Benefits Act. However, after *McCarty* corrected the *Casas* court's interpretation of federal law, the California courts continued to follow the mistaken *Casas* reasoning, to the exclusion of the correct *Costo* analysis of the Veterans' Benefits Act.

Under the mistaken *Casas* analysis, *In re Marriage of Fithian*, 10 Cal.3d 592 [111 Cal.Rptr. 369] (1974) allows community property treatment of military retirement benefits because there was no federal preemption. *Fithian*, of course, was overruled by *McCarty v. McCarty*, 435 U.S. 210 (1981). However, according to the present California analysis, 10 U.S.C. §1408 retroactively overruled *McCarty*.

However, application of FUSFSPA to eliminate *McCarty* directly conflicts with four Congressional declarations that FUSFSPA is not retroactive. (House Conf. Rpt. 97-749; House Rpt. 100-563; House Rpt. 101-665; and House Rpt. 101-923.)

Further, California's determination of retroactivity directly conflicts with §555(e) of Public Law 101-510, which makes it clear that the new second sentence of 10 U.S.C. §1408(c)(1), withholding subject matter jurisdiction applies to every state court reopening judgment or order, regardless of when the reopening order is entered.

In addition, California's analysis does not recognize that **both issues** addressed by *Casas* are questions of federal law and have been overruled. According to the California Supreme Court, itself, the *Casas* case presented:

> "* * * **two issues** for review: (1) following enactment of the Federal Uniform Services Former Spouses' Protection Act (FUSFSPA), does a California court have the **power to award** a former spouse an interest in a military retiree's pension which was **omitted from an earlier dissolution decree**; and (2) if the court can make such an award, should the division of the pension be based on its 'disposable' (as defined in FUSFSPA) amount or its 'gross' amount? We conclude that the court has the power to award a

former spouse an interest in the 'gross' amount of a military retiree's pension. (*Casas*, *supra*, 42 Cal.3d at 136.)

California completely ignores the fact that *Casas* was overruled on the **net versus gross** issue by *Mansell v. Mansell*, 490 U.S. 581 [104 L.Ed.2d 675, 109 S.Ct. 2023] (1989). And now, *Casas* has been overruled on its other issue, subject matter jurisdiction over "omitted" retirements, by §555 of Pub. L. 101-510. Therefore, California has no basis for exercise of subject matter jurisdiction.

Casas has absolutely no vitality as a tool for analyzing federal law. Both of the *Casas* conclusions have been overruled. *Mansell* settled the "net-versus-gross" question and the retroactivity clause of §555(e) limits subject matter jurisdiction for all judgments, regardless of date. The retroactivity clause provides:

> "EFFECTIVE DATES.-- (1) The amendment made by subsection (a) [*Prohibition of Certain Retroactive Court Orders*] **shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act**." Pub. L. 101-510, Subparagraph (e).)

Thus, California law, as discussed in the trial and appellate courts in the present case, in *Casas*, and in virtually all other California cases is not relevant. The federal restriction of subject matter jurisdiction applies to all judgments.

In re Marriage of Curtis, (1 Civ. A053562) ___ Cal.App.4th ___ [___ Cal.Rptr.2d ___] (June 10, 1992) discusses the effect of Pub. L. 101-510, §555. The *Curtis* court found §555 "curious," and questioned the rationale of

Congress. However, when §555 is viewed in the full light of the entire legislative history of FUSFSPA, Congressional rationale is clear.

Congress never intended to allow state courts to reopen dissolution cases, notwithstanding the legion of state cases that found otherwise. (House Conf. Rpt. 97-749; House Rpt. 100-563; House Rpt. 101-665; and House Rpt. 101-923.) FUSFSPA merely allows division of retirement benefits payable after June 25, 1981, in cases decided after February 1, 1983, unless a prior judgment specifically reserved jurisdiction. All other cases are controlled by *McCarty*, *Mansell*, 10 U.S.C. §1408(c)(1), and 38 U.S.C. §5301.

Even though *Curtis* questioned Congressional rationale in enacting §555, the court correctly observed and held that:

> "**The amendment in fact deprives state courts of subject matter jurisdiction to open pre-*McCarty* dissolutions for the purpose of dividing military retirement benefits.**" (*Curtis*, *supra.*)

Curtis is the first California decision to recognize that state courts have misapplied FUSFSPA for almost ten years. The *Curtis* opinion correctly recognized the Congressional record unequivocally demonstrates the word "treat" in FUSFSPA means "characterize." The word "treat" is not, and never has been, as *Casas* mistakenly determined, a mere limitation on ordering the Service Secretaries to pay former spouses directly.

A state court may not treat [characterize] military retirement pay as community property except in accordance with the limitations of FUSFSPA. (10 U.S.C. §1408(C)(1); *Curtis*, ___Cal.App.4th ___ at n. 9.) For this independent reason, the post-FUSFSPA state court decisions that purported

to exercise jurisdiction based upon state law were mistaken and probably void. (Code of Civil Procedure §473 [last sentence]; *People v. West Coast Shows, Inc.*, 10 Cal.App.3d 462, 467 (1970); *Costa v. Banta*, 98 Cal.App.2d 181, 182 (1950).)

Even the California Court of Appeal that applied *res judicata* to prevent Major Mansell from challenging community property division of his V.A. disability benefits acknowledged that, if subject matter jurisdiction is preempted, then the stipulation and order allowing division would be void. (*Mansell v. Mansell*, 217 Cal.App.3d 219, 225 [265 Cal.Rptr. 227] (1989).) In California, void judgments are always subject to collateral attack. (*County of Ventura v. Tillett*, 133 Cal.App.3d 105 [183 Cal.Rptr. 741] (1982).) As of the time of the *Mansell* remand, Congress had not yet declared, other than in the legislative history, that the subject matter jurisdictional limitations of FUSFSPA apply to all state actions, regardless of their date. Now it has. (Pub. L. 101-510, §555(e).)

FUSFSPA did not obliterate *McCarty*, as some courts have assumed. And, FUSFSPA certainly did not repeal 38 U.S.C. §5301. Public Law 101-510 §§ 555(a) and (e) conclusively establish that FUSFSPA is the only authority that ever existed for community property division of military retirement benefits, and FUSFSPA specifically excludes community property division of V.A. disability benefits. (10 U.S.C. §1408(a)(4).)

Because of FUSFSPA's retroactive jurisdictional prohibition, FUSFSPA completely occupies the field of subject matter jurisdiction over military retirement pay in marital dissolution cases. All purported theories of state-law subject matter jurisdiction are preempted, both prospectively and

retrospectively. Therefore, the reopening order in the present case is void.

II
COMMUNITY PROPERTY DIVISION OF V.A. DISABILITY BENEFITS VIOLATES 38 U.S.C. §5301, WHICH POSITIVELY REQUIRES THAT DISABLED VETERANS ACTUALLY RECEIVE THE BENEFITS

When state action is in conflict with a direct pronouncement of federal law, the state act is invalid, even if the state moves in an area of its general competence. As the Court pointed out in *Ridgway v. Ridgway*, 454 U.S. 46 (1981):

> "Notwithstanding the limited application of federal law in the field of domestic relations generally, (see *McCarty v. McCarty*, 435 U.S. 210, 101 S.Ct. 2728, 2735, 69 L.Ed.2d 589 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593-594 (1890)), this court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in federal rights. **** And, specifically, **a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments.**" (emphasis added, *Ridgway*, *supra*, 454 U.S. at 54-55).

If a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim of validity--and this is true even though the state action in question was taken within a sphere in which the states could otherwise act (*Free v. Bland*, 369 U.S. 663, 666 (1962)).

This Court has, on many previous occasions, considered direct conflicts between federal law and state community property laws, and each time resolved the conflict in favor of federal pre-emption (*McCune v. Essig*, 199 U.S. 382 (1905); *Wissner v. Wissner* 338 U.S. 655 (1950); *Free v. Bland*, 369 U.S. 633 (1962); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *McCarty v. McCarty*, 435 U.S. 210 (1981); *Ridgway v. Ridgway*, 454 U.S. 46 (1981) *Mansell v. Mansell*, 490 U.S. 581 (1989)). In the present case there is an entire body of federal law protecting veterans' benefits--Title 38, U.S.C. Thus, there is a clear and substantial federal interest which cannot be served if state community property law intercepts the benefits and awards them to a healthy former spouse.

In the present case, Major Banks waived a portion of his military longevity retirement in order to receive disability compensation from the V.A. (38 U.S.C. §§1110 and 5305). His monthly compensation is **not based on any particular period of service**, but rather is a flat sum determined on the basis of his percentage of disability and impairment of his earning capacity (38 U.S.C. §§1114 and 1155). As a recipient of V.A. disability benefits, Major Banks is fully protected by the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. §5301), which shield disability benefits from every form of legal process, except for child support (*Rose v. Rose*, 481 U.S. 619 [107 S.Ct. 2029, 95 L.Ed.2d 599] (1987).

Section 5301(a) states:

> (a) "Payment of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors,

> and **shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary**. ****".(*emphasis added.*)

Language identical to the phrase highlighted above, word for word, was involved in the case of *Wissner v. Wissner*, 338 U.S. 655, 659 (1950), and again in the case of *Ridgway v. Ridgway*, 454 U.S. 46, 52-53 (1981). The *Wissner* Court held that the language prevented the state from applying community property law to reach the federal benefits. As a separate ground for reversal, the *Wissner* Court found that the diversion of future payments to be received by the beneficiary would be a "seizure" prohibited by the anti-attachment provision. (*Wissner, supra.*, 338 U.S. at 659.) The *Ridgway* Court, commenting on *Wissner*, said "*These are strong words and a positive ruling.*" (*Ridgway, supra*, 454 U.S. at 55.)

> Venerable and worthy as this community [the business relationship of man and wife] is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases." (*Wissner, supra*, 338 U.S. at 660).

Five years ago this Court had occasion to comment further on the distinction between support and community property claims. In *Rose v. Rose*, 481 U.S. 619 [107 S.Ct. 2029, 95 L.Ed.2d 599] (1987), the Court discussed the exception to anti-attachment statutes for alimony and child support in a context of *community property*.

> "Consistent with the distinction suggested in *Wissner v. Wissner*, 338 U.S. 655 (1950), Congress had amended the Social Security Act to authorize garnishment of certain federal benefits, including

> railroad retirement annuities, for spousal and child support **but not for community property divisions**. 42 U.S.C. §§659 and 662. We construed these amendments to 'expressly override' the anti-attachment provisions for support claims, finding it 'logical to conclude that Congress * * * thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that **community property claims, which are not based on need, could not do so.**'" (emphasis added, *Rose, supra.*, 481 U.S. at n.6).

In the present case, there is no issue of child support or alimony. Thus, in keeping with the consistently uniform decisions of the Court, and consistent with the direct enactment of Congress, Major Banks' disability benefits are protected by the anti-attachment provisions of 38 U.S.C. §5301.

Congress has positively required, by direct enactment, that the disabled veteran actually receive the disability benefits. The passage of the FUSFSPA did nothing to change the protections of the Veterans' Benefits Act (*Mansell v. Mansell*, 490 U.S. 581 [104 L.Ed.2d 675, 109 S.Ct. 2023] (1989).) Therefore, the reopening order in the present case is void.

III
38 U.S.C. §5301 IS PART OF A GENERALIZED CONGRESSIONAL PLAN FOR PROTECTING VETERAN'S DISABILITY BENEFITS FROM ANY FORM OF ATTACHMENT EXCEPT FOR CHILD SUPPORT

Congress has charged the Veterans Administration with management of benefits for service-connected disabled

veterans as its highest priority mission. (Senate Report No. 97-504 on the Omnibus Budget Reconciliation Act of 1982 (Pub. L.97-253), p.245). The Veterans' Benefits Act conforms to this generalized Congressional plan to protect veterans' disability benefits from state interference.

> "The basic purpose of the disability compensation program, throughout its history, has been one of providing relief from the impaired earning capacity of veterans disabled as the result of their military service. The amount of compensation payable varies according to the degree of disability which, in turn, is required by law to represent, to the extent practical, the average impairment in earning capacity resulting from such disability or combination of disabilities in civil occupations." (House Report No. 96-1155, p. 4, Veterans' Disability Compensation and Housing Benefits Amendments of 1980 (Public L. 96-385)).

In addition to providing at least some compensation for the injuries and disabilities that have been visited upon members in the service of their country, disability payments also benefit the nation as a whole. Disability payments help maintain a fit military force by encouraging those eligible for benefits to retire, rather than to conceal their disability and continue in active service for economic reasons. Protection of those disability benefits also helps preclude service members from concealing their impairments until they are transferred to a state that will not try to diminish the compensation by awarding part of it to a healthy former spouse. Like most of the other fringe benefits, they also facilitate recruitment. Furthermore, adequate disability benefits help avoid the possibility that disabled veterans will be a burden on local communities and other state and federal programs.

The thorough, thoughtful, and deliberate balance weighed by Congress (Senate Report No. 98-174,pp. 221-222 to accompany S-675, Department of Defense Authorization Act of 1984, (Pub. L. 98-94), 97 Stat. 614 (10 U.S.C. §§1461-1467) concerning payment of V.A. disability benefits is evinced by the singular treatment of retired military members. Other federal retirees who qualify for V.A. compensation are not required to waive a portion of their retirement pay to receive V.A. benefits.

Civil Service employees in the executive, legislative and judicial branches of government, certain foreign service retirees of the Department of State, and certain Central Intelligence Agency retirees can receive both full retirement pay and full V.A. compensation. (*Absher v. U.S.*, 9 Ct. Cl. 223, 224 (1985), aff'd, 805 F.2d 1025 (Fed.Cir., 1986), cert. den., 481 U.S. 1028 [107 S.Ct. 1953, 95 L.Ed.2d 526] (1987).) Military retirees may not (38 U.S.C. §5305).

Further evidence of the overall Congressional intent to protect V.A. disability benefits can be found in other federal programs. The Social Security Act waives federal immunity from attachment of federal pay, including military pay, for child support and alimony. (42 U.S.C. §659.) However, community property is specifically excluded from the definition of alimony. (42 U.S.C. §662[c].)

Congress allows garnishment of Civil Service retirement benefits for community property purposes. (Pub. L. 95-366, 92 Stat. 600, 5 U.S.C. §8345(j)). And, Congress allows garnishment of Foreign Service retirement for community property division (22 U.S.C. §§4044 et seq.) However, Congress, presumably for good and sufficient reasons, has enacted no comparable provision for benefits payable by the Veterans Administration.

This contention finds added support in the provision of a separate benefit for a disabled veteran's dependent spouse (38 U.S.C. §1115), a benefit which terminates on the last day of the calendar month in which an annulment or divorce occurs (38 U.S.C. §5112[b][2].)

Another significance of 38 U.S.C. §5301 in the present case, is that it speaks in clear terms concerning exemptions to the protection of the funds after receipt by the beneficiary. Section 5301 specifically states that the exemption from taxation does not extend to any property purchased in part or wholly out of the disability payments. However, there is no such exemption from the anti-attachment provisions for the community property claims of former spouses.

Furthermore, subdivision b of §5301 specifically **prohibits collection, by offset or otherwise**, out of the benefits except for amounts due to the federal government by reason of overpayments or illegal payments. Nevertheless, California's reopening order for community property division, without citing any specific statutory language, puts petitioner's ex-wife in a position even stronger than that of the federal government.

Congress is sensitive to the confidence placed in it by military personnel (Senate Report No. 98-174, pp. 221-222, *supra.*). Therefore, changes to the military retirement program must come as the product of thorough, thoughtful, and deliberate study that weighs heavily the impact of such changes on military force management and national security needs. When Congress intends to allow exemption from the anti-attachment policy, it specifically says so. Congress allows attachment of permanent investments for tax obligations. (§5301(a).) Congress also allows offset to recover overpayments and unlawful payments. (§5301(b).) However, nothing in any statute or decision of the Court has ever

allowed attachment or offset for collection of community property claims.

Until Congress chooses to act, its long-standing anti-attachment policy, as expressed in the Veterans' Benefits Act, FUSFSPA and the Social Security Act is controlling. A program as carefully balanced as the V.A. disability compensation system should not be disrupted by the vagaries of the laws of the fifty states. Yet, California's reopening of the final judgment after the mistaken *Casas* decision to allow community property division of petitioner's V.A. disability compensation does just that.

IV
OFFSETTING GARNISHMENT OF OTHER ASSETS CONSTITUTES A SEIZURE OF THE V.A. DISABILITY BENEFITS FORBIDDEN BY 38 U.S.C. §5301

California may not make an offsetting award from other assets. (*Wissner v. Wissner*, 338 U.S. 655, 659 (1951).) To do so would, in effect, anticipate the benefit in violation of the statute, just as would awarding a house or other property as an offset (*Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588-589 (1979),) and as imposition of a constructive trust would operate as a forbidden "seizure." (*Ridgway v. Ridgway*, 454 U.S. 46, 60 (1981).) The state court's attempt to limit the anti-attachment provisions because of equitable interests violates the unqualified sweep of the statute. Section 5301 prohibits, in the broadest of terms, any "*attachment, levy, or seizure by or under any legal or equitable process whatever*," even after receipt by the disabled veteran (*Ridgway, supra.*, 454 U.S. at 60.)

In *Wissner v. Wissner*, 338 U.S. 655 (1950), the Court found it unnecessary to decide whether California is entitled

to call Army pay community property. (*Id.*, 338 U.S. at 657 n.2.) Nevertheless, for two separate reasons, the Court held that the wife of a deceased Army officer had no community property interest in the proceeds of a National Service Life Insurance policy, the premiums of which were paid with community property.

The Court held that because the federal statute gave the service member the absolute right to designate the beneficiary, **the state may not interfere** with that designation by awarding the proceeds to another, or **by awarding an equivalent amount under some other theory**. (338 U.S. at 659.)

As an independent ground for reversing the California community property award of the benefits, the *Wissner* Court held that **the state judgment was in effect a seizure in violation of [former] 38 U.S.C. §816** (*Ibid.*) It is significant to note that the operative language of §816 is identical, word-for-word, to the operative language of §5301.

The *Wissner* court commented on the distinction between community property obligations and support obligations based upon particular needs in alimony and support cases. These comments eventually formed the basis of the holding of the Court in the recent case of *Rose v. Rose*, 481 U.S. 619 [107 S.Ct. 2029, 95 L.Ed.2d 599] (1987).

Concerning an offsetting award of other assets, the *Wissner* Court held:

> "Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." (338 U.S. at 659.)

Almost thirty years later, the Court again addressed an offsetting award of other property to compensate for federal pre-emption of state community property laws. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Court held that **an offsetting award would defeat the purpose of the statute barring anticipation of payments**. (*Id.*, at 588-590.)

Like anti-attachment provisions generally, §5301 insures that the benefits are actually received by the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process, notwithstanding any other law of any state. It prevents the vagaries of state law from disrupting the national scheme and guarantees a national uniformity that enhances the effectiveness of Congressional policy.

CONCLUSION

For these reasons, certiorari should be granted to address the federal pre-emption issue that California refuses to acknowledge.

Respectfully Submitted,

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July, 1992.

FILED
January 1, 1986
Joyce Russell Smith,
Clerk

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ATTORNEY FOR: Verna J. Banks

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
720 Ninth Street
Sacramento, California 95814

MARRIAGE OF

Case No.
748218

PETITIONER: VERNA JO BANKS
RESPONDENT: JOHN W. BANKS, II

JUDGMENT-RESERVED ISSUES
Dissolution

Date marital status ends: November 1, 1984

1. This proceeding was heard as follows: Contested
   a. Date: 4/24-26/85 & 7/29/85 Dept.: 7
   b. Judge: RICHARD K. PARK
   c. Petitioner present in court Attorney present in court: D.M. PERKOVICH
   d. Respondent present in court Attorney present in court: CLARENCE D. WALTERS

2. The court acquired jurisdiction of the respondent on 9/27/79 Respondent appeared

3. THE COURT ORDERS, GOOD CAUSE APPEARING:

a. Judgment of dissolution be entered. Marital status is terminated and the parties are restored to the status of unmarried persons on the following date: (Status Only Dissolution entered November 1, 1984).

4. THE COURT FURTHER ORDERS:

Jurisdiction is reserved over all other issues and all present orders remain in effect except as provided below.

The parties' stipulations recited in open court on April 26, 1985 and July 29, 1985, are incorporated herein as part of the Orders of the Court. The parties are hereby ordered to comply with the terms and conditions thereof.

Date: January 2,1986 /s/ PARK
Judge of the Superior Court

1. THE COURT ORDERS that of the funds on deposit in Attorney Walters' client trust account in the approximate amount of $14,351.14, including the Home Life Insurance Policy refund, $3,000.00 shall be awarded to Respondent as his sole and separate property and all of the remaining funds shall be awarded to Petitioner as her sole and separate property.

2. IT IS FURTHER ORDERED that each party shall retain a one-half interest in the following community property and such interest shall be awarded to the respective parties as their sole and separate property.

(a) The mineral rights reserved on the Reese Road property as described in the grant deed recorded with the Sacramento County Recorder's Office on November 8, 1984, Book 84 11- 8, page 1072, document number 194742, admitted into evidence as Petitioner's Exhibit 4 and more particularly described as follows:

Real property in the City of unincorporated area, County of Sacramento, State of California, described as:

AS TO AN UNDIVIDED 1/3rd INTEREST

Parcel A and Parcels 1 thru 23, inclusive, as said parcels are shown on that certain map entitled "Parcel 1 as shown on 49 P.M. 11 and a portion of the Southeast 1/4 Section 2, T. 7N, R.5, M.D.B.&M." filed for record in the office of the County Recorder, County of Sacramento on July 20, 1981 in Book 65 of Parcel Maps, Map No. 39.

EXCEPTING THEREFROM An undivided one-sixth interest in one hundred percent (100%) of All oil, asphaltum, minerals, hydrocarbon substances and geothermal rights in or on said land below a depth of 500 feet from the surface of said land, together with the right to produce develop, explore and extract said substances, but without however the right to entry on the surface of said land or within said 500 feet from the surface thereof

as reserved in the deed from Verna J. Banks to John W. Banks, II, as his separate property, dated July 11, 1979, recorded July 31, 1979, Book 7907-31, Official Records, Page 1783, as to all that portion being within Parcel 1 of Parcel Map Book 49, Map No. 11.

ALSO EXCEPTING THEREFROM AN UNDIVIDED TWO-SIXTH INTEREST in one Hundred percent (100%) of all oil, mineral, geothermal and similar right below a depth of five hundred (500 ft.) of existing surface elevation but shall have no right to surface entry, subject to all matters of record and all matters which would be disclosed by a survey or inspection of the real property as set forth in those certain deeds executed Real Estate Restoration, Inc., a California corporation and Merit Design, Inc., a California corporation, recorded in Book 8304-06, Pages 1298 & 1301 respectively.

(b) The 7.3% limited partnership interest in Auburn Equestrian Park Limited Partnership, which name was later changed to Auburn Bluffs, Limited, described in the Certificate of Limited Partnership of Auburn Equestrian Park recorded with the Sacramento County Recorder's Office on June 12, 1978, Book 7806, page 121896 thru page 121899, document number 88473 and admitted into evidence as Petitioner's Exhibit 8.

(c) The Frenchtown Hills property, subject to those encumbrances recorded against the property as designated on the preliminary title report issued by Placer Title Company dated January 23, 1985, marked for identification as Petitioner's Exhdibit [sic] 18, and more particularly described as follows:

Real property situated in the State of California, County of El Dorado, unincorporated area, described as:

Lots 1 through 23, 25, 27 through 30, inclusive as shown on that certain map entitled "Frenchtown Hills a Rural Subdivision", filed in the office of the County Recorder of said County on February 8, 1980 in Map Book "F" at page 113.

(d) Twenty (20) acres in Arkansas title to which shall be held as tenants in common by Petitioner and Respondent. The court shall retain jurisdiction over this asset to equally divide the community interest in the event Arkansas law does not provide for equal undivided ownership interests equivalent to a tenancy in common.

3. IT IS FURTHER ORDERED that of the Century Properties Fund XII, Limited Partnership Units shall be awarded to Petitioner as her sole and separate property.

4. IT IS FURTHER ORDERED that the following property shall be awarded to Respondent as his sole and separate property:

(a) The community residence, with the existing liens and encumbrances thereon, located at 4643 Paula Way, Fair Oaks, Sacramento County, California, and more particularly described
as:

Parcel F as shown on the parcel map recorded in Book 4 of Parcel Maps, Map No. 14, recorded in said County.

(b) Keogh account located in the Putnam Fund.

(c) 1977 Cadillac

(d) Proceeds from sale of Petitioner's 1977 Cadillac.

(e) 7.5% general partnership interest in Auburn Bluffs Limited

(f) All interests of J.L.C., Inc. or J.L.C. Partnership I in the Auburn Bluffs property.

(g) Any benefits Respondent may obtain by way of the proposed agreement and option between J.L.C. Enterprises, Inc. and Auburn Bluffs, Limited respecting the Reese Road property

5. IT IS FURTHER ORDERED that three (3) lots in the Auburn Bluffs subdivision are confirmed to Petitioner as her sole and separate property and more particularly described as follows:

Lots 20, 29 and 32 of Auburn Bluffs as shown on the Subdivision Map recorded March 29, 1984 in book N of Maps at page 91, Placer County Records.

6. IT IS FURTHER ORDERED that the court shall retain jurisdiction over Petitioner's retirement with the City of Sacramento and Respondent's retirement with the State of California.

7. IT IS FURTHER ORDERED that Respondent shall assume and hold Petitioner harmless

from all the community obligations and other debts listed on his financial declaration and community property declaration, attached to his pretrial statement both signed on January 8, 1985 and filed with the court, except that any community debts listed which are secured by a lien or deed of trust recorded against the Auburn Bluffs property or the Frenchtown Hills property as set forth in the Placer Title Company Preliminary Report of January 23, 1985, marked for identification as Petitioner's Exhibit 18, will stay with the property.

8. IT IS FURTHER ORDERED that each party shall bear their own attorneys' fees and costs with respect to all proceedings through July 29, 1985. The court shall retain jurisdiction to award any fees and costs incurred in obtaining entry or enforcement of this judgment and allocation of the pensions.

9. IT IS FURTHER ORDERED that the Order to Show Cause re Contempt filed February 7, 1985 shall be dropped and all claimed arrearages in spousal support shall be deemed satisfied by the division of funds held in Attorney Walters' client trust account as set forth hereinabove.

10. IT IS FURTHER ORDERED that each party shall execute any and all documents reasonably necessary to carry out the provisions of this judgment.

11. IT IS FURTHER ORDERED that each party shall hold the other party harmless from and shall defend them against any liability or litigation that might

arise from the property and/or debts assumed by the respective parties.

12. IT IS FURTHER ORDERED that if it shall hereafter be determined by a court of competent jurisdiction that either party is possessed of any community property not set forth herein, the party in possession of any such property shall pay to the other on demand an amount equal to one-half of the fair market value thereof.

13. IT IS FURTHER ORDERED that the parties shall equally divide the costs of preparation of the original and two copies of the court reporters transcript of the Stipulation recited on April 26, 1985.

14. WHEREAS, the issue of characterization and division of Respondent's military disability and retirement pension benefits having been submitted to the court for judicial determination, the court makes the following findings:

(a) Respondent entered the military on November 21, 1951.

(b) The parties married on April 17, 1954.

(c) Respondent retired from the military on December 1, 1971.

(d) The parties separated on June 25, 1979.

(e) The parties were married 17 years and 7 months of the 20 years Respondent was on active duty.

(f) Respondent suffered medical problems and elected to receive a portion of his retirement as a disability pension in approximately 1978.

(g) Respondent's percentage of disability was set at approximately 40%.

IT IS THEREFORE ORDERED THAT:

(a) The portion of Respondent's military retirement attributable to disability is not subject to division as community property, as governed by In re Marriage of Costo (1984) 156 CA3d 781.

(b) The community has a 87.9% interest in Respondent's military retirement.

(c) Petitioner is entitled to 43.95% of that portion of Respondent's retirement pay remaining after the amounts attributable to disability are deducted.

IT IS FURTHER ORDERED THAT the issue of Petitioner's right to reimbursement for her portion of the retirement pay which the Respondent received and spent after the date of separation is bifurcated from all other issues and the court retains jurisdiction for presentation of further evidence and argument at a further hearing to be reset by either party.

15. WHEREAS, the issue of characterization and division of personal property having been submitted to the court for judicial determination, IT IS THEREFORE ORDER THAT:

(a) The following items are confirmed to Respondent as his sole and separate property:

(1) Leather bedroom chairs received from Saregent Irvin.

(2) Two large J.B.L. speakers purchased with inherited funds.

(3) Chaffing dishes purchased with inherited funds.

(4) Bone china purchased with inherited funds.

(5) Two sets of snack glasses received from Japanese employees.

(b) All other items of personal property in which Respondent claimed a separate property interest at the time of the July 29, 1985 hearing are found to be community property.

(c) Petitioner shall be awarded the items of personal property in her possession.

(d) Respondent shall be awarded the items of personal property of his choice in his possession in an amount equal to the value of those items of personal property in Petitioner's possession.

(e) Respondent shall receive an additional credit in the amount of $3,000.00 which Respondent gave to Petitioner to establish a separate household. Said credit is to be offset against the value of the personal property in his possession.

(f) All items of community personal property in each party's possession shall be appraised by Alex Sabbadini, F.A.S.A. Petitioner and Respondent shall each pay one-half of Mr. Sabbadini's fees.

(g) The court shall retain jurisdiction over the determination of the values of the personal property items and any amount necessary to equalize the division of the personal property items in each party's possession. This issue shall be bifurcated from all other issues and

may be determined at a further hearing to be reset by either party.

APPROVED AS TO FORM:

/s/ PERKOVICH
D.M. PERKOVICH
Attorney for Petitioner

FILED
May 4, 1987
JOYCE RUSSELL SMITH,
CLERK

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO
720 Ninth Street
Sacramento, CA 95814

PETITIONER: VERNA JO BANKS Case No. 748218
RESPONDENT: JOHN W. BANKS, II

FINDINGS AND ORDER AFTER HEARING:
Division of Military Retirement Pay

This proceeding was heard as follows:

1. a. Date: April 15, 1987 Dept.: 13
b. Judge: William R. Ridgeway
Attorney present in court: D.M. PERKOVICH
Respondent present in court

On the Motion filed
Date: March 2, 1987 By: Petitioner

The court finds that pursuant to Casas v. Thompson (1986) 42 C3d 131, Respondent is ordered to pay each month to Petitioner, effective September 1, 1986, 43.95% of his gross military retirement pay. The Court further orders Respondent

to submit by May 4, 1987 a written request to the U.S. Air Force for a warrant each month stating both the gross amount and the net amount of his retirement pay. Respondent shall furnish the Court with a copy of said request.

Date: May 4, 1987

/s/ RIDGEWAY
Judge of the Superior Court
WILLIAM R. RIDGEWAY

Date: April 17, 1987

/s/ PERKOVICH
D.M. PERKOVICH
Attorney for Petitioner

FILED
December 7, 1990

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Attorney for Petitioner: VERNA J. BANKS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

VERNA J. BANKS,	)	CASE NO. 748218
	)	Dept. 13
Petitioner,	)	
v.	)	
	)	ORDER ON
	)	SUBMITTED
JOHN W. BANKS, II,	)	MATTERS
	)	
Respondent.	)	
	)	

The above-entitled matter came on for hearing on July 6, August 1, and October 12, 1990 in Department 13 of the Superior Court of California, County of Sacramento, the Honorable Vance Raye presiding. Upon considering the moving and opposing papers and upon hearing oral argument, the matter was taken under submission. On October 30, 1990, the court issued its tentative ruling. No objection being filed, the tentative ruling became the court's order.

For good cause appearing,

IT IS HEREBY ORDERED:

1. Respondent's Motion of Set Aside the Judgment entered May 4, 1987 ordering respondent to pay 43.95 percent of his gross military retirement pay to petitioner each month is DENIED;

2. Petitioner's request for a determination of arrearages is GRANTED. Arrearages and interest to June 6, 1990 are determined to be in the sum of $12,156.81.

3. Petitioner's request for enforcement orders are granted as follows:

Respondent is ordered to endorse the warrant, or other instrument, received in settlement of respondent's claims against the State of California, Department of Education, et al. The proceeds of the settlement shall be deposited in a blocked interest bearing account under the control of petitioner's counsel. Disbursements shall be made from the account as follows:

a. $12,156.81 shall be paid to petitioner in satisfaction of prior orders and as payment of arrears and interest through June 30, 1990;

b. $20,000.00 shall be placed in a separate, interest bearing blocked account, controlled by petitioner's attorney, and shall remain in such account until the respondent develops a plan, approved by the Court, to ensure the timely payment of amounts due from respondent's military retirement under the judgment entered on May 4, 1987. Pending the approval of such plans, payments required to ensure compliance with the Court's judgment shall be made monthly to petitioner from such account;

c. $3,850.00 shall be paid to petitioner's attorney as and for attorney's fees;

d. The balance in the account, within thirty (30) days after the above disbursements, shall be paid to respondent and

his attorney, Carlos Alcala, by check payable to them jointly and requiring the endorsement of each.

Dated: Nov 1991

/s/ RAYE
Judge of the Superior Court
(Vance Raye)

Filed
January 31,1992
Court of Appeal 3rd District
Robert L. Liston, Clerk

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In Re The Marriage of VERNA J. and JOHN W. BANKS.	)	C010194
	)	
	)	(Super. Ct.No.748218)
VERNA J. BANKS, Respondent,	)	
v.	)	
JOHN W. BANKS II, Appellant.	)	

This is an appeal from an order after judgment in an action for dissolution of a marriage. Appellant (Husband) moved to set aside a three-year old judgment awarding respondent (Wife) a community property share of his gross military retirement pay. He claimed the order is void for lack of jurisdiction because some of his military retirement pay is attributable to disability payments not subject to community property division. The trial court denied Husband's motion and he appeals. We will affirm the order denying the motion to set aside the judgment.

FACTS

On March 2, 1987, Wife moved for an order dividing Husband's military retirement pay pursuant to the ruling in Casas v. Thompson (1986) 42 Cal.3d 131. On May 4, 1987, judgment was entered dividing Husband's military retirement pay and directing him to pay each month to Wife 43.95 percent of his gross retirement pay. The judgment was explicitly founded upon Casas. No appeal was taken from the judgment.

On June 12, 1990, Wife sought to obtain a declaration of arrearage under the judgment and to enforce it by levying upon proceeds of a settlement in a tort action between husband and his former employer. On June 21, 1990, Husband replied with a motion to set aside the judgment on the ground it is void because some of his military retirement pay is attributable to disability payments not subject to community property division under Mansell v. Mansell (1989) 490 U.S. 581 [104 L.Ed.2d 675] (Mansell I), which overruled Casas. The trial court found no lack of jurisdiction warranting a determination that the judgment founded on Casas was void and denied Husband's motion.

DISCUSSION

Husband contends that the trial court erred in denying his motion to set aside the judgment. He argues that federal statutes preempt the California community property law as to military disability benefit payments. He asserts that this renders erroneous the judgment dividing his military retirement pay based, among other things, upon his disability benefit payments. Wife replies here, as in the trial court, that

the arguments are barred by res judicata. Husband rejoins that the judgment is void for lack of subject matter jurisdiction.[1]

Husband's counsel unsuccessfully tendered the same contention in In re Marriage of Mansell (1989) 217 Cal.App.3d 219, 227-229 (Mansell II).[2]The court found no lack of subject matter jurisdiction, relying upon a distiction in In Re Marriage of Thomas (1984) 156 Cal.App.3d 631, 636 between subject matter jurisdiction preemption and the preemption of state law by federal law. Husband suggests that

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[1]We assume for the sake of discussion that a lack of subject matter jurisdiction would present a valid basis for overturning a prior final judgment per se. (See, e.g., 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 194, p. 630; but see, e.g., Rest.2d Judgments, § 12; Stoll v. Gottlieb (19838) 305 U.S. 165 [83 L.Ed. 104]; Levy v. Cohen (1977) 19 Cal.3d 165, 172-174.) Husband may also be tendering a claim that regardless of subject matter jurisdiction collateral attack should be permitted on the ground that the judgment is an act in excess of jurisdiction. If so we would reject that claim on the ground that he makes no showing of the peculiar requirements for permitting such an attack. (See 2 Witkin, Cal. Procedure, supra, Jurisdiction, § 271, p. 670.)

[2] Husband's counsel improperly failed to mention this authority in his 48 page opening brief. Chided by opposing counsel for this lack of candor, husband's counsel admits the omission was not inadvertent and excuses himself on the ground the court of appeal in Mansell II refused to address what he perceives as the issue and was engaged in "judicial legerdemain." We expect counsel to disclose California legal authority known to be directly adverse to the position of his client. (See Rules Prof. Conduct, rule 7-105; People v. Crafts (1970) 13 Cal.App.3d 457, 460; see generally, Model Rules of Prof. Conduct, rule 3.3.) Counsel is free to attempt to distinguish or attack precedent, but knowingly failing to attend to it, at best, wastes the time of opposing counsel and the court.

the distinction is "*sui generis* to military retirement cases." (Orig. emphasis.)

The preemption of inferior by higher law as a result of a conflict is commonplace, given, e.g., the hierarchies of constitutions, statutes, common law and of federal, state, and local lawgivers. Even where preemption arises from a conflict with the paramount constitutional law the ordinary rule is that a judgment rendered based upon the lesser law preempted by the conflict is not void and may not be collaterally challenged on the ground of lack of jurisdiction. (See, e.g., Chicot County Drainage District v. Baxter State Bank (1940) 308 U.S. 371 [84 L.Ed. 329]; Rescue Army v. Municiple Court (1946) 28 Cal.2d 460, 463-464; Annot., Validity and Effect of Judgment Based Upon Erroneous View as to Constitutionality or Validity of a Statute or Ordinance Going to the Merits (1947) 167 A.L.R. 517.)[3]

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[3] Husband suggests that federal law preemption of any kind renders an inconsistent state judgment void. He points to Hoffman v. United States (9th Cir. 1968) 391 F.2d 195 concerning National Service Life Insurance and Ridgway v. Ridgway (1981) 454 U.S. 46 [70 L.Ed.2d 39] concerning Servicemen's Group Life Insurance policies. Neither case is apposite; nor does either discuss res judicata. Both concern disputes between a beneficiary designated by the deceased policyholder and claimants seeking policy benefits based upon the disobedience by the deceased policyholder of a state court judgment directing him to designate the claimants as beneficiaries. Both cases invoive efforts to attach polict benefits in derogation a federal anti-attachment statute. Neither case presents a question of holding a final judgment void as between the parties thereto. The questions posed in Hoffman and Ridgway are the consequences of judgments with respect to nonparties in future proceedings.

Subject matter jurisdiction preemption is the unusual variety.

> "It is generally true that a judgment by a court of competentjurisdiction bears a presumption of regularity and is not there-after subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack." (Kalb v. Feuerstein (1940) 308 U.S. 433, 438-439 [84 L.Ed. 370, 374, fns. omitted.)

The manner of specifying such a prohibition in Kalb was plain, the federal statue said that the filing of a bankruptcy petition immediately subjected the farmer and his property "to the exclusive jurisdiction of the [bankruptcy] court." (308 U.S. at p. 440 [84 L.Ed. at p. 375, emph. added.) This language expressly invokes subject matter jurisdiction. "The provisions of law investing a court or other tribunal with authority to adjudicate a type of controversy are referred to as the rules of subject matter jurisdiction and sometimes as rules of 'competency' or competence.'" (Rest.2d Judgments, § 11, com. (a), p. 109.) The federal courts under the federal Constitution have subject matter jurisdiction only where it has been delegated. "In contrast, the principal trial

court in state court systems is a court of general jurisdiction, i.e., it has not exclusively consigned to some other tribunal." (Id., at p. 108.) The statutory language in Kalb exclusively consigned the authority to adjudicate the controversy to the bankruptcy court. Husband fails to identify similar statutory language prohibiting the exercise of state court jurisdiction over matters of disputed property interests in military retirement pay; accordingly he offer no persuasive reason to depart from the holding in Mansell II.

Nonetheless, Husband unaccountably suggests that Mansell II and Thomas "fully support" his view of federal subject matter preemption. His first argument is founded on a sentence in Mansell I which says that prior to the Uniformed Services Former Spouses' Protection Act "federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay..." (480 U.S. at p. 588 [104 L.Ed.2d at p. 684].) He suggests that this language compels the conclusion that the underlying statutory preemption identified in McCarty v. McCarty (1981) 453 U.S. 210 [69 L.Ed.2d 589] is one of subject matter jurisdiction within the two part scheme of Mansell II and Thomas.

This argument is apparently founded upon the adverb "completely." The passing usage is completely unavailing. There is nothing in the context of that usage that shows it was selected for the point in issue. The contrary implication is to be found in footnote 5 of the Mansell I opinion: "Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction." (480 U.S. at p. 586 [104 L.Ed.2d at p. 684].)

Husband's remaining argument is that federal preemption of jurisdiction arises from the anti-attachment

clause which protects a veteran's receipt of disability benefits, 38 United States Code section 3101 (a) (now § 5301). It provides that veteran's benefits "shall not be assignable except to the extent specifically authorized by law, and ... shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the [veteran]." (Ibid.) Husband argues that this language works a preemption of California community property law to the extent that it would divide community property in light of the value attributable to the disability portion of a veteran's military retirement pay. Assuming for the sake of discussion that he is correct,[4] Husband fails to explain why the result of this language goes to subject matter jurisdiction rather than the ordinary preemption arising from a conflict with higher law.

We discern nothing in the language that suggests that a preemption, if any, founded on this provision would work a limitation in subject matter jurisdiction. There is no language addressed to the jurisdiction of the state courts by the assignment of exclusive jurisdiction to some other forum. Nor does it address the question whether judicial acts taken with respect to division of military retirement are subject to collateral attack. Rather the provision addresses otherwise available remedies which might be invoked under the general law of civil judgments. No claim is made that the order here seeks to levy upon disability pay.

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[4] The majority opinion in Mansell I eschewed resolving the question whether this provision also occasions a preemption. (Mansell I, 490 U.S. at p. 587, fn. 6 [104 L.Ed.2d at p.684].) The dissenters in Mansell I expressed the view that it does not work a preclusion of all consideration of the existence of such benefits but only protects the disability benefits from attachment. (490 U.S. at p. 603, dis. opn of O'Connor, J. [104 L.Ed.2d at p. 694].)

DISPOSITION

Husband supplies no persuasive reason to depart from the precedents of Mansell II and Thomas. Accordingly, the order denying vacation of the judgment is affirmed.

/s/BLEASE ,

Acting P.J.

We concur:

/s/SIMS , J.

/s/MARLER , J.

Third Appellate District No. C010194
S025577

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

VERNA J. BANKS, Respondent

V.

JOHN W. BANKS II, Appellant

SUPREME COURT
FILED
APR 15, 1982
Robert Wandruff Clerk
Deputy

Appellant's petition for review DENIED.

/S/ LUCAS
Chief Justice

TITLE 10, U.S.C.A. §1408

§1408. Payment of retired pay in compliance with court orders

(a) DEFINITIONS.-- IN THIS SECTION:

(1) The term "Court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)));
or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which-

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required

by law in order to receive compensation under title 5 or title 38;";

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term 'retired pay' includes retainer pay.

(b) EFFECTIVE SERVICE OF PROCESS.-- FOR THE PURPOSES OF THIS SECTION--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is

personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the

Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) AUTHORITY FOR COURT TO TREAT RETIRED PAT AS PROPERTY OF THE MEMBER AND SPOUSE.--

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any

proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of

(A) his residence, other than because of military assignment, in the territorial jurisdiction of the court,

(B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) PAYMENTS BY SECRETARY CONCERNED TO SPOUSE OR FORMER SPOUSE.--

(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(e) LIMITATIONS.--

(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders

on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired, pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable

retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the

maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) IMMUNITY OF OFFICERS AND EMPLOYEES OF UNITED STATES.--

(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) NOTICE TO MEMBER OF SERVICE OF COURT ORDER ON SECRETARY CONCERNED.--

A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) REGULATIONS.--

The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

TITLE 38 U.S.C. §1110. Basic Entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a pre-existing injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or pre-existing injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

TITLE 38 U.S.C. §1114. Rates of wartime disability compensation

For purpose of section 1110 of this title--

(a) if and while the disability is rated 10 percent the monthly compensation shall be $71;

(b) if and while the disability is rated 20 percent the monthly compensation shall be $133;

(c) if and while the disability is rated 30 percent the monthly compensation shall be $202;

(d) if and while the disability is rated 40 percent the monthly compensation shall be $289;

(e) if and while the disability is rated 50 percent the monthly compensation shall be $410;

(f) if and while the disability is rated 60 percent the monthly compensation shall be $516;

(g) if and while the disability is rated 70 percent the monthly compensation shall be $652;

(h) if and while the disability is rate 80 percent the monthly compensation shall be $754;

(i) if and while the disability is rated 90 percent the monthly compensation shall be $849;

(j) if and while the disability is rated as total the month compensation shall be $1,411;

TITLE 38 U.S.C. §1115. Additional compensation for dependents

Any veteran entitled to compensation at the rates provided in section 1114 of this title, and whose disability is rated not less than 30 percent shall be entitled to additional compensation for dependents in the following monthly amounts:

(1) If and while rated totally disabled and--

(A) has a spouse but not child, $82;

(B) has a spouse and one or more children, $138 plus $44 for each child in excess of one;

(C) has no spouse but one or more children, $57 plus $44 for each child in excess of one;

(D) has a parent dependent upon veteran for support, then, in addition to the above amounts, $67 for each parent so dependent;

(E) notwithstanding the other provisions of this paragraph, the monthly payable amount on account of a spouse who is (i) a patient in a nursing home or (ii) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person, shall be $149 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section; and

(F) notwithstanding the other provisions of this paragraph, the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuing a course of instruction at an approved educational institution shall be $126 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section.

(2) If and while rated partially disabled, but not less than 30 percent in an amount having the same ratio to the amount specified in paragraph (1) of this section as the degree of disability bears to total disability, the amounts payable under this paragraph, if not a multiple of $1, shall be rounded down to the nearest dollar.

TITLE 38 U.S.C. §1155. Authority for schedule for rating disabilities

The Administrator shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The

schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, and total, 100 percent. The Administrator shall from time to time readjust this schedule of ratings in accordance with experience.

TITLE 38 U.S.C. §5112. Effective dates of reductions and discontinuances

(b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension--

(2) by reason of marriage annulment, divorce, or death of a dependent of a payee shall be the last day of the month in which such marriage, annulment, divorce, or death occurs;

TITLE 38 U.S.C. §5301. Nonassignability and exempt status of benefits

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments.

The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity. For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving his or benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or his estate; or (2) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws to such beneficiary or his estate to his dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or liens, or interest on such premiums or liens or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c) In the case of a person who--

(1) has been determined to be eligible to receive pension or compensation under laws administered by the

Veterans' Administration but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration of of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 5305 of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Veterans' Administration of such person's eligibility for such pension or compensation, the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

TITLE 38 U.S.C. §5305. Waiver of retired pay

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of any such waiver, the amount

waived, and the effective date of the reduction in retired or retirement pay.

TITLE 42 U.S.C. §659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process.

Notwithstanding any other provision of law (including section 407 of this title) effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

TITLE 42 U.S.C. §662. Definitions

For purposes of section 659 of this title--[enforcement of individual's legal obligations to provide child support or make alimony payments]

(c) The term "alimony," when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite,

maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

California Civil Code §4800(a). Division of Community Estate.

(a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this section, the court shall, either in its judgment of dissolution of marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally. For purposes of making this division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community estate of the parties in an equitable manner.

For the purposes of division and in confirming or assigning the liabilities of the parties for which the community estate is liable, the court shall characterize liabilities as separate or community and confirm or assign them to the parties in accordance with subdivision (c).

As used in this section, "community estate" includes both the community and quasi-community assets and liabilities of the parties.

CALIFORNIA CODE OF CIVIL PROCEDURE, §473.

Amending Pleadings-Continuance-Relief From Mistake, Inadvertence, Surprise or Excusable Neglect; Time Limit; Affidavit of Merits Not Required-Correcting Clerical Errors-Setting Aside Void Judgments or Orders.

The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading

proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, order or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment entered against his or her client, unless the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

Whenever the court grants relief from a default or default judgment based on any of the provisions of this

section, the court may: (1) impose a penalty of no greater than one thousand dollars ($1,000) upon an offending attorney or defaulting party, (2) direct that an offending attorney pay an amount no greater than one thousand dollars ($1,000) to the State Bar Client Security Fund or (3) grant such other relief as is appropriate.

However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or upon compliance with other sanctions ordered by the court.

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

Supreme Court, U.S.
FILED
AUG 14 1992
OFFICE OF THE CLERK

No. 92-120

In The

Supreme Court of the United States

October Term, 1992

JOHN W. BANKS II,

Petitioner,

v.

VERNA J. BANKS,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeal For The Third Appellate District

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court has jurisdiction to review a question of state law as to the res judicata effect to be given to a state court judgment.

Whether this Court should review an unpublished state court decision that is of no precedential value and the facts of which are not likely to recur.

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Respondent Verna J. Banks respectfully submits this brief in opposition to the petition for writ of certiorari, which she received on July 17, 1992.

Petitioner is seeking review of a question of state law as to which this Court has no jurisdiction. *Mansell v. Mansell*, 490 U.S. 581, 586 n.5, 104 L.Ed.2d 675, 684 n.5, 109 S.Ct. 2023, 2027 n.5 (1989) (*Mansell I*). Based on California res judicata law, a state court denied petitioner's motion to set aside a 3½ year-old family law judgment, which had never been appealed. The state appellate court affirmed, and the California Supreme Court denied review.

Petitioner misstates the issues in this case in an attempt to support jurisdiction. He poses the question whether the anti-attachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301, preempts state court power. This issue is simply not present in this case.

Even if the Court were able to reach the substantive federal law issues petitioner seeks to raise, these issues are of no continuing import. The opinion below is unpublished and of no precedential value. This Court's decision in *Mansell I* now prevents states from treating military disability pay as community property. The unique facts of this case will not recur.

The Court should deny the certiorari petition without hesitation, just as it did in *In re Marriage of Mansell*, 217 Cal.App.3d 219, 265 Cal.Rptr. 227 (1989), *cert. denied sub nom. Mansell v. Mansell*, ___ U.S. ___, 112 L.Ed.2d 197, 111 S.Ct. 237 (1990) (*Mansell II*).

Ms. Banks agrees with petitioner's list of parties and opinions below.

JURISDICTION

Petitioner seeks review of an unpublished decision of the Court of Appeal of the State of California, Third Appellate District, *In re Marriage of Banks*, C010194, issued on January 31, 1992. Appendix D to Petition for a Writ of Certiorari.[1] The California Supreme Court denied review on April 15, 1992. Appendix E.

The California Court of Appeal affirmed a trial court order filed December 7, 1990, which denied a motion by petitioner John W. Banks to set aside a prior family law judgment dividing property upon dissolution of marriage. That prior judgment, entered on May 4, 1987, was never appealed. The Court of Appeal determined that, under California law, the prior judgment was res judicata.

This Court does not have jurisdiction under 28 U.S.C § 1257 to review this decision. Petitioner wrongly asserts that the issue is whether state courts may violate 38 U.S.C. § 5301 and 10 U.S.C. § 1408(a)(4). Rather, the determinative issue is purely a question of state law: whether California's res judicata law bars reopening a state court family law judgment that was never appealed and has long since become final for all purposes. This Court has no jurisdiction over this matter of pure state law.

[1] All further references to the record are to documents included in the Appendix to the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY AUTHORITY

In addition to the constitutional and statutory provisions cited by petitioner, this case also involves:

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rule 2(a), California Rules of Court[2]:

> [A] notice of appeal shall be filed within 60 days after the date of mailing notice of entry of judgment by the clerk of the court . . . , or within 60 days after the date of service of written notice of entry of judgment by any party upon the party filing the notice of appeal, or within 180 days after the date of entry of judgment, whichever is earliest, ...

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[2] The language provided for Rule 2(a), California Rules of Court, is that effective January 1, 1986 to January 1, 1990, which is the applicable time period. Effective January 1, 1990, Rule 2(a) was amended in ways insignificant to this appeal. The period in which a notice of appeal may be filed still ends no later than 180 days after the date of entry of judgment.

STATEMENT OF THE CASE

This proceeding began in 1979 when Ms. Banks filed a state court action for dissolution of her marriage of 25 years to petitioner husband. He served in the United States military for 20 years, more than 17 of which were during the marriage. He retired from the military in 1971, and he elected to receive 40 percent of his military retirement as disability pay. Appendix A, pp. 8-9.

On January 2, 1986, the California Superior Court, County of Sacramento, determined that 87.9 percent of husband's military retirement was community property. Under California law then in effect, the portion of the retirement attributable to disability was not viewed as community property. Accordingly, Ms. Banks was awarded a community property interest in the retirement pay remaining after the disability pay was subtracted. Appendix A, p. 9.

In 1986, the California Supreme Court ruled that the community property interest in military retirement pay included disability pay.[3] Ms. Banks moved to reopen the property division to obtain her community interest in husband's disability pay. Under California law, a court may reopen dissolution actions to divide community assets left undivided in earlier proceedings.[4]

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[3] *Casas v. Thompson*, 42 Cal.3d 131, 143-144, 720 P.2d 921, 929, *cert. denied*, 479 U.S. 1012, 93 L.Ed.2d 713, 107 S.Ct. 659 (1986).

[4] *Casas*, 42 Cal.3d at 139, 720 P.2d at 925; *Henn v. Henn*, 26 Cal.3d 323, 330, 605 P.2d 10, 13 (1980).

Her motion was granted. On May 4, 1987, in accordance with California's community property law then in effect, the superior court entered a judgment awarding Ms. Banks her half of the community's interest in husband's gross military retirement pay, including disability pay. Appendix B. Husband never appealed this 1987 judgment. Appendix D, p. 2. Under California law, the last day to appeal occurred no later than 180 days after its entry. Rule 2(a), California Rules of Court. The court's authority to set the judgment aside also ended after six months. California Code of Civil Procedure § 473. The judgment is now final for all purposes.

In 1989, in *Mansell I*, this Court considered whether the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (FUSFSPA),[5] which authorizes states to treat military retirement pay as community property, also allows states to include as community property military retirement benefits which are waived in order to receive disability benefits. The Court concluded that "under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been

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[5] FUSFSPA was enacted in response to *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981). *McCarty* held that the federal scheme of military retirement benefits preempted state community property laws because "the application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation." *Id.*, 453 U.S. at 223, 69 L.Ed.2d at 600, 101 S.Ct. at 2736. In FUSFSPA, "Congress sought to change the legal landscape created by the *McCarty* decision." *Mansell I*, 490 U.S. at 587, 104 L.Ed.2d at 684, 109 S.Ct. at 2028.

granted the authority to treat total retired pay as community property." *Mansell I*, 490 U.S. at 589, 104 L.Ed.2d at 685, 109 S.Ct. at 2028.

In 1990, both parties filed motions in state superior court in connection with the 1987 judgment. Petitioner had refused to comply with the judgment, and Ms. Banks sought an order allowing her to collect arrearages by levying on a settlement he received in an unrelated action. Petitioner asserted that the 1987 judgment should be set aside based on *Mansell I*, claiming that the judgment was void for lack of subject matter jurisdiction. Ms. Banks opposed on the ground that his motion was barred by California's res judicata law. Appendix D, pp. 2-3.

By an order dated December 7, 1990, the superior court denied petitioner's belated attack on the 1987 judgment, and granted Ms. Banks's motion to enforce. Appendix C.

Petitioner appealed this order, the California Court of Appeal affirmed in an unpublished decision, and the California Supreme Court declined to review. Although *Mansell I* made it clear that federal law precludes states from treating military disability pay as community property, and the 1987 judgment was erroneous in applying state community property law to the military disability pay, the state court's error in selecting the applicable law did not mean that its 1987 judgment was void. State courts still have subject matter jurisdiction to divide and distribute property upon dissolution of marriage. The 1987 judgment, though wrong, was within the court's subject matter jurisdiction; since it was not timely appealed, it is now res judicata. Appendix D.

The court of appeal also rejected husband's claim that the anti-attachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301, made the judgment void. "No claim is made that the order here seeks to levy upon disability pay." Appendix D, p. 7.

Since the 1987 judgment is not void for lack of subject matter jurisdiction, the appellate court affirmed the order denying petitioner's 1990 motion to set that judgment aside. Appendix D, p. 1.

SUMMARY OF ARGUMENT

This marital dissolution case presents only state law issues arising under California's law of res judicata, over which this Court has no jurisdiction. The question decided by the California Court of Appeal had nothing to do with interpreting federal law or the correctness of the 1987 judgment in applying that law. The only issue was whether, in 1990, the trial court properly applied the state res judicata law to deny petitioner's motion to reopen the 1987 judgment.

Although the 1987 judgment wrongly construed federal law, that decision, now long since final, was a judgment the state court had subject matter jurisdiction to enter. The 1987 judgment merely distributed property upon dissolution of marriage. The fact that federal law should have been applied in distributing veterans' disability pay does not mean that the state court lacked jurisdiction. The power to decide includes the power to decide wrongly, and, under California law, which is consistent with the principles announced by this Court, a

judgment that is final and not appealed is res judicata, even though it was wrongly decided.

There is no issue here as to violation of the anti-attachment provisions of the Veterans' Benefits Act, 38 U.S.C. § 5301. Ms. Banks does not seek to attach petitioner's military benefits, and no state court has ever purported to authorize any such attachment in this case. The only attachment involved is of an unrelated settlement petitioner received.

The case has no significant impact. Indeed, it has no legal effect at all except as to the parties involved. The decision is unpublished, may not be cited, and is of absolutely no precedential value. Even if its reasoning were to be adopted in other cases, it would affect, at most, only a few recalcitrant spouses who, like petitioner, ignore state court family law judgments until long after the time to appeal or otherwise attack them has passed and the judgments have become final and binding for all purposes.

There is no reason for this Court to exercise its discretionary power to review the state court decision in this case.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO REVIEW THIS CASE SINCE NO FEDERAL QUESTIONS ARE RAISED

A. THIS COURT HAS NO JURISDICTION TO REVIEW STATE COURT DETERMINATIONS OF STATE LAW QUESTIONS, INCLUDING THE RES JUDICATA EFFECT OF A STATE COURT JUDGMENT

An unbending rule of this nation's judicial system is that the jurisdiction of this Court does not include the power to review state court decisions on questions of state law. This principle is now spelled out in 28 U.S.C. § 1257(a), which grants this Court authority to review state court decisions which are claimed to be "repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."[6]

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[6] Petitioner mistakenly invokes this Court's jurisdiction under former 28 U.S.C. § 1257(3). Four years ago, § 1257 was amended so that former paragraphs (1) and (2), authorizing appeals of state court decisions, were deleted. Former paragraph (3), unchanged, became paragraph (a) in revised § 1257, so that certiorari is now the only available means for cases from state courts to reach this Court. Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988).

A case decided by this Court over a hundred years ago described this principle and applied it to circumstances like the present case. In *Chouteau v. Maffit*, 111 U.S. 200, 28 L.Ed. 400, 4 S.Ct. 340 (1884), this Court was asked to review a state court decision giving res judicata effect to a prior state court judgment, thereby precluding the appellant from asserting a federal law issue. This Court dismissed the appeal even though the appellant sought to raise a federal issue, because the state court had sustained the res judicata defense without reaching the federal question, saying:

> [I]t is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question presented by the defense was not whether a federal right had been properly denied by a judgment, but whether the right had been once judicially determined so as to become *res judicata* between the parties. . . . It is apparent, therefore, that no federal question which there may have been in the case was decided by the state court, and that the decision of such a question was not necessary to the final decree rendered. *Without determining whether, if the former judgment had not been a bar to the action, there were questions in the case that might have given us jurisdiction, we grant the motion to dismiss.*

Id., 111 U.S. at 201, 28 L.Ed. at 401, 4 S.Ct. at 340-341 (emphasis by Court).

Similarly, in *San Francisco v. Itsell*, 133 U.S. 65, 33 L.Ed. 570, 10 S.Ct. 241 (1890), this Court dismissed review of a decision of the California Supreme Court which rested on state res judicata law, holding:

> This court has no jurisdiction to review a judgment of the highest court of a State, unless a federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error.

Id., 133 U.S. at 66, 33 L.Ed. at 571, 10 S.Ct. at 242.

The California Supreme Court had held that a prior judgment concerning a title dispute, which had not been reversed, barred a later ejectment action because the earlier decision was res judicata under state law and was therefore "conclusive of this branch of the case." *San Francisco v. Itsell*, 80 Cal. 57, 60, 22 P. 74, 75 (1889), *appeal dism.* 133 U.S. 65, 33 L.Ed. 570, 10 S.Ct. 241 (1890).

In dismissing the appeal, this Court noted that the only issue decided by the California Supreme Court was "the issue whether the former judgment . . . was a bar to this action." *San Francisco v. Itsell*, 133 U.S. at 66, 33 L.Ed. at 571, 10 S.Ct. at 242. The appeal was dismissed because the issue of the res judicata effect of the prior judgment was not within this Court's jurisdiction to review. "That was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States." *Id. See also Northern Pac. R. Co. v. Ellis*, 144 U.S. 458, 462, 36 L.Ed. 504, 506, 12 S.Ct. 724, 726 (1892); *Adams v. Louisiana Bd. of Liquidation*, 144 U.S. 651, 653, 36 L.Ed. 578, 579, 12 S.Ct. 756, 757 (1892); *Beals v. Cone*, 188 U.S. 184, 188, 47 L.Ed. 435, 438, 23 S.Ct. 275, 278 (1903).

These cases are the basis for the statement in *Mansell I* that:

> Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction.

Mansell I, 490 U.S. at 586 n.5, 104 L.Ed.2d at 684 n.5, 109 S.Ct. at 2027 n.5.

In *Mansell I*, as here, a husband had attempted, after several years, to reopen a California family law judgment that treated his military disability pay as community property, arguing that federal law precluded application of the state community property law.[7] This Court's decision in *Mansell I* was limited to that federal question, leaving it entirely to the California courts to determine whether, under state law, res judicata prevented the husband from asserting federal claims after the prior judgment had become final for all purposes.

On remand, the state appellate court held that California res judicata law did bar the husband from reopening the old judgment, even though that judgment was erroneous. "[U]nder California law, there was, and is, no basis to reopen the settlement and reach the federal question." *Mansell II*, 217 Cal.App.3d at 235, 265 Cal.Rptr. at 236. This Court denied certiorari. *Mansell v. Mansell*, ___ U.S. ___, 112 L.Ed.2d 197, 111 S.Ct. 237 (1990).

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[7] In *Mansell I*, the husband claimed the prior judgment was erroneous under *McCarty*, just as petitioner here argues that the 1987 judgment in this case is erroneous under *Mansell I*.

The present case is *Mansell II* once again. Like *Mansell II*, it only involves the question this Court left for state courts to answer in *Mansell I*: whether res judicata, as applied in California, prevents petitioner from attempting to reopen the prior state court property division judgment, which had become final for all purposes.

Mansell II makes clear that under California law, unless a judgment within the court's subject matter jurisdiction is reversed after timely appeal or appellate writ, the judgment is valid and conclusive, even if erroneous. Quoting *Estate of Gardiner*, 45 Cal.App.2d 559, 563, 114 P.2d 643, 645 (1941), the court stated:

> An erroneous decree which is not void on its face is forever binding and conclusive upon the parties named, upon the status defined, or upon the property described, unless upon motion seasonably made it be vacated or upon appeal it be reversed.¶ . . . The fact that a court shall decide erroneously does not affect the validity or the finality of a judgment any more than to decide correctly. . . . Its jurisdiction is not defeated or limited by a wrong decision.

Mansell II, 217 Cal.App.3d at 230, 265 Cal.Rptr. at 233.

Even though the 1987 judgment violated FUSFSPA, as this court later ruled in *Mansell I*, that does not make the judgment void. Under California law, "[A] final judgment or order is res judicata even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties." *Moffat v. Moffat*, 27 Cal.3d 645, 655-656, 612 P.2d 967, 973 (1980), quoting *Pacific Mut. Life Ins. Co. v. McConnell*, 44 Cal.2d 715, 725, 285 P.2d 636, 641 (1955), *appeal dism.* and

cert. denied, 350 U.S. 852, 100 L.Ed. 852, 76 S.Ct. 472 (1956). *See also Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control*, 55 Cal.2d 728, 731, 361 P.2d 712, 714 (1961); and *Slater v. Blackwood*, 15 Cal.3d 791, 797, 543 P.2d 593, 596 (1975).

California follows the same rule as federal courts: the doctrine of res judicata precludes the readjudication of all matters, including jurisdictional issues, which were or might have been previously litigated between the same parties. As explained in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 84 L.Ed. 329, 333, 60 S.Ct. 317, 319 (1940), federal courts have "authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally."

A strong and obvious interest exists in protecting courts and litigants from endless litigation. *Slater*, 15 Cal.3d at 797, 543 P.2d at 596.

> It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined.

Stoll v. Gottlieb, 305 U.S. 165, 172, 83 L.Ed 104, 109, 59 S.Ct. 134, 138 (1938). This policy is particularly compelling in the area of family law, where the acrimony of

failed relationships may cause parties to prolong the judicial process needlessly.

State courts also have a compelling interest in definitively resolving family law issues, which have always been "preeminently matters of state law." *Mansell I*, 490 U.S. at 587, 104 L.Ed.2d at 684, 109 S.Ct. at 2027.

Both these interests are best served by allowing state courts to determine when property disputes which spouses bring to the state courts are finally resolved. Here, the state appellate court concluded that, whether or not the prior judgment was correct, husband's 1990 motion to set aside that judgment so he could reopen and prolong litigation over the distribution of property was properly denied. The 1987 judgment which he never appealed was res judicata. This is a state law determination that is not subject to review in this Court.

B. FEDERAL LAW PREEMPTS STATE COMMUNITY PROPERTY LAW, BUT DOES NOT DEPRIVE STATE COURTS OF JURISDICTION TO DIVIDE PROPERTY

Husband claims that the 1987 judgment was not merely incorrect, but was void. He argues that since federal law, and not state law, governs the characterization of the military disability pay as separate or community property, federal courts have exclusive jurisdiction as to this issue. "This contention, if true, would be a proper basis for attacking the judgment." *Mansell II*, 217 Cal.App.3d at 227, 265 Cal.Rptr. at 231.

However, his premise is false. Nothing in FUSFSPA or anywhere else in federal law grants federal courts any jurisdiction to distribute property upon dissolution of marriage. Petitioner cites no authority for any federal court jurisdiction, exclusive or otherwise, to distribute property between divorcing spouses, and family law disputes, including disposition of marital property, remain a quintessential matter of state court jurisdiction.

The state appellate court correctly determined that the judgment was not void. The court relied upon *Mansell II*, which rejected the same argument and concluded that *McCarty* and *Mansell I* did not hold that federal law divested state courts of jurisdiction to divide military retirement benefits; those decisions only require state courts to apply federal law in characterizing military retirement benefits as community or separate property. *Mansell II*, 217 Cal.App.3d at 228, 265 Cal.Rptr. at 231.

The obligation of state courts to apply federal law, and not state law, to the division of retirement benefits certainly does not imply a preemption of all state court jurisdiction. *Mansell II*, as well as *In re Marriage of Thomas*, 156 Cal.App.3d 631, 636, 203 Cal.Rptr. 58, 59 (1984), distinguishes between federal law preemption of state law, which merely requires state courts to apply federal law and does not divest them of jurisdiction, and subject matter preemption, where federal law deprives state courts of all power to act.

As the court below explained, where, as here, preemption is based on a conflict between state and federal law, "the ordinary rule is that a judgment rendered based upon the lesser law preempted by the conflict is not void

and may not be collaterally challenged on the ground of lack of jurisdiction." Appendix D, p. 4. Under California law, "it is well settled that erroneous final judgments serve as a bar to further litigation on the action, whereas in general void judgments may be collaterally attacked." *Moffat*, 27 Cal.3d at 654, 612 P.2d at 972.

Nothing in FUSFSPA, *McCarty*, or *Mansell I*, indicates that federal law divests state courts of all subject matter jurisdiction over military retirement benefits. *Mansell II*, 217 Cal.App.3d at 228, 265 Cal.Rptr. at 232. To the contrary, FUSFSPA expressly recognizes that state courts have the authority to distribute property upon dissolution of marriage, and authorizes state courts to apply state community property law in dividing disposable military retirement pay. 10 U.S.C. § 1408(c)(1).[8] The Act clearly anticipates that in marital dissolution cases state courts will continue to divide military retirement pay between divorcing spouses, so long as divisions are made in compliance with federal law. For example, FUSFSPA creates a mechanism under which the federal government

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[8] Petitioner relies upon *In re Marriage of Curtis*, 7 Cal.App.4th 1, ___ Cal.Rptr. ___ (1992), to support his argument that FUSFSPA actually deprives state courts of all jurisdiction. In fact, this decision holds exactly the contrary. Quoting *Mansell II*, 217 Cal.App.3d at 228, 265 Cal.Rptr. at 231, the court said: "The holding in *McCarty* that federal law preempted state law in this area simply meant that state courts were bound to apply federal law in determining the character of military pension benefits. There was no divestiture of jurisdiction." *Curtis*, 7 Cal.App.4th at 11. *Curtis* merely held that the 1990 amendments to FUSFSPA make it clear that a state court is not to apply FUSFSPA retroactively.

will make direct payments to a former spouse who presents to the Secretary of the relevant military service a state court order granting him or her a portion of the military retiree's disposable retired pay. 10 U.S.C. § 1408(d)(1).

Similarly, this Court's decisions assume that state courts will continue to exercise subject matter jurisdiction in dissolution cases to divide marital property and confirm separate property. *Mansell I* stated that, if California law permits, the state court could "reopen the settlement and reach the federal question." *Id.*, 490 U.S. at 586 n.5, 104 L.Ed.2d at 684 n.5, 109 S.Ct. at 2027 n.5. This statement clearly implies that state courts do have the power to decide federal law issues.

McCarty involved a direct appeal of a state court judgment treating military retirement pay as community property upon dissolution of marriage, rather than confirming the benefits to the husband as his separate property. After holding that the state court erred in applying state community property law to military retirement pay, this Court reversed and "remanded for further proceedings not inconsistent with this opinion." *Id.*, 453 U.S. at 236, 69 L.Ed.2d at 608, 101 S.Ct. at 2743. Implicit in this remand order is the jurisdiction of the state court to award the veterans' pay in accordance with federal law.

While federal law determines whether or not veterans' benefits are subject to state community property laws, and, in particular, may preempt states from treating military disability pay as community property, nothing in federal law evidences any intent to deprive state courts of their traditional authority and subject matter jurisdiction

law merely requires state courts to divide military retirement benefits in accordance with FUSFSPA.

A state court's misreading of federal law as to what military benefits are subject to division between spouses under state community property law may be judicial error. It is not, however, an act in excess of the court's subject matter jurisdiction.

C. THIS CASE INVOLVES NO ATTACHMENT, LEVY OR SEIZURE PROHIBITED BY 38 U.S.C. § 5301

Husband attempts to create jurisdiction under 28 U.S.C. § 1257 by invoking, in his question presented for review, the anti-attachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301. This statute prohibits any levy on veterans' payments due from the Veterans' Administration (now the Department of Veterans Affairs).[9] However, husband's suggestion that this case raises any issue as to attachment of veterans' pay is a mischaracterization of the facts in this case.

The 1987 judgment simply orders husband to pay Ms. Banks her share of the community property, including his gross military retirement pay, and to request the military to provide a monthly statement of the amount of his total retirement pay. Appendix B. The judgment in no way

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[9] Under 38 U.S.C. § 5301(a), payments due veterans under the Veterans' Benefits Act "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever."

attempts to make his veteran's benefits "liable to attachment, levy, or seizure by or under any legal or equitable process whatever," as § 5301 prohibits.

The only levy in this case occurred in the December 7, 1990 order, and has nothing at all to do with veterans' pay. The court authorized Ms. Banks to attach husband's settlement of his claims against the State of California, claims which are wholly unrelated to veterans' pay. Appendix C.

In *Mansell I*, the majority of this Court found it unnecessary to decide whether the anti-attachment clause of the Veterans' Benefits Act separately precludes states from treating veterans' disability pay as community property. *Id.*, 490 U.S. at 587 n.6, 104 L.Ed.2d at 684 n.6, 109 S.Ct. at 2027 n.6. However the majority opinion did refer to *Rose v. Rose*, 481 U.S. 619, 95 L.Ed.2d 599, 107 S.Ct. 2029 (1987), a decision which held that a state court had jurisdiction to hold a veteran in contempt for failure to pay a child support obligation even though the veteran's only income was veterans' benefits. In *Rose*, the Court explained that this method of enforcing the veteran's obligation was not preempted by the anti-attachment provision.

> The contempt proceeding did not turn the Administrator into a collection agency; the Administrator was not obliged to participate in the proceeding or to pay benefits directly to appellee.

Id., 481 U.S. at 630, 95 L.Ed.2d at 610, 107 S.Ct. at 2036.

The *Mansell I* majority also referred to *Wissner v. Wissner*, 338 U.S. 655, 94 L.Ed. 424, 70 S.Ct. 398 (1950), a

case in which the anti-attachment provision was applied to preempt a state from literally seizing the payments due under a veteran's insurance policy as payment of a wife's share of community property. The present case, unlike *Wissner*, involves absolutely no seizure of veterans' benefits.

Justice O'Connor, joined by Justice Blackmun, who dissented in *Mansell I*, would have reached the anti-attachment issue. They flatly rejected any claim that a community property interest in retirement pay could not be recovered out of income or assets separate from the veterans' benefits themselves.

> To recognize that § 3101(a) [now § 5301(a)] protects the funds from a specific source, however, does not mean that § 3101(a) prevents Gaye Mansell from recovering her 50 percent interest in Major Mansell's gross retirement pay out of any income or assets he may have *other* than his veterans' disability benefits.

Id., 490 U.S. at 603, 104 L.Ed.2d at 694, 109 S.Ct. at 2036.

Since there is no question now before the Court as to whether veterans' benefits can be attached, husband may not, based on mere conjecture that attachment may be attempted at some future time, elevate this purely hypothetical issue into a basis supporting jurisdiction.

II.

THIS COURT NEED NOT EXERCISE ITS DISCRETIONARY POWER TO REVIEW AN UNPUBLISHED DECISION WITH NO PRECEDENTIAL VALUE

Even if this Court had jurisdiction, this is not a case worthy of the Court's attention. The state court opinion

under review is unpublished, and under California law, it is not to be relied upon or cited in other cases.[10] The opinion has no effect whatsoever beyond the present case.

Even if the opinion could be cited as precedent, its facts will not be repeated. *Mansell I* is definitive: state courts may no longer treat veterans' disability pay as community property.[11] The 1987 judgment petitioner seeks to reopen was decided two years prior to *Mansell I*. There is absolutely no suggestion that future state court decisions will not properly apply FUSFSPA as interpreted in *Mansell I*.

This Court's review by certiorari is a matter of discretion. *Hicks v. Miranda*, 422 U.S. 332, 344, 45 L.Ed.2d 223, 236, 95 S.Ct. 2281, 2289 (1975). In 1988, when 28 U.S.C. § 1257 was amended, all avenues to appeal state court decisions to this Court were eliminated, and the only remaining means of review is by petition for certiorari. Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). As explained in the commentary to the revised § 1257, this change

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[10] Under the California Rules of Court, Rule 977(a), an unpublished opinion "shall not be cited or relied on by a court or a party in any other action or proceeding," except for purposes of res judicata, collateral estoppel or law of the case, or when the opinion is relevant to a criminal or disciplinary proceeding.

[11] *Mansell I*, decided May 30, 1989, effectively reversed *Casas v. Thompson*, decided by the California Supreme Court on July 21, 1986, with certiorari denied on December 8, 1986. At most, only those few cases decided within the intervening period in reliance on *Casas* could share in the error as to federal law which occurred in the 1987 judgment here.

removed any mandatory jurisdiction this Court had to review state court decisions, and instead gives the Court the discretion to decide in each case whether review of a state court decision is worthy of the Court's time and energy. "The certiorari route is discretionary: in effect, it's a petition for permission to appeal. The Court grants the petition only if it finds that the case presents issues that warrant its attention." David D. Siegel, *Commentary on 1988 Revision*, 28 U.S.C.A. § 1257 (West Supp. 1992) at 42.

The state court decision petitioner asks this Court to review merely adopts the reasoning of a prior decision, *Mansell II*. The refusal to reopen the judgment in *Mansell II* rests on the exact same principles of state res judicata law that the court applied in this case. This Court has already denied review of *Mansell II*. *Mansell v. Mansell*, ___ U.S.___, 112 L.Ed.2d 197, 111 S.Ct. 237 (1990). Review should also be denied here.

CONCLUSION

For these reasons, respondent Verna J. Banks respectfully requests the Court to deny the petition for writ of certiorari, either for lack of jurisdiction or under the Court's discretion to reject review of insignificant cases.

The res judicata effect of a state court family law judgment is purely a matter of state law, which federal courts have no jurisdiction to review. No federal issue is raised in this case, and petitioner's attempt to manufacture a purely conjectural federal question is unsupported by the record.

Even if review were possible, it is unnecessary. The opinion of the Court of Appeal, which is unpublished, has no precedential value, and this Court's decision in *Mansell I*, after the erroneous 1987 judgment was entered, means that this error as to federal law will not recur.

The petition for writ of certiorari should be denied.

Dated: August 14, 1992

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